hearing, on the grounds of the administrative law judge's suppression of her residence in the same building with one of the Complainants and possible association between them which would have included exparte communication.

The New York State Appellate Division affirmed the motion court's dismissal of the Complaint, without mention of the due process issue, which was the crux of the action. The New York State Court of Appeals denied the Petitioner's motion for leave to appeal the order and judgment of the Appellate Division.

Constitutional Questions Presented in Courts Below

In the New York State Supreme Court, the Complaint plead violations of 42 USC 1983, on the grounds of denial of due process. The administrative law judge did not recuse herself, nor afford a hearing on recusal. The failure of the administrative law judge to state on the record that she lived in the same apartment building as did the Complainant, prior, during the time of the events at issue alleged to have occurred in the complainant's apartment and continuing through the lengthy hearing, deprived the Petitioner of the opportunity to move for recusal on grounds of partiality.

The Petitioner's appeal to the Appellate Division sought review of dismissal of the Complaint setting forth the foregoing. The Court of Appeals denied leave to appeal without stating a reason. The New York State Supreme Court did not consider the denial of due process argument, nor did the Appellate Division, nor the Court of Appeals.

Argument in Support of Petition

The Petitioner's 42 USC §1983 complaint, was that he was denied due process, because the administrative law judge suppressed the fact that she lived in the same apartment building as did one of the two complaining witnesses prior, during the events to which the witness testified occurred

in the building, and throughout the administrative hearing. The Petitioner's argument was that due process required the foregoing should have been disclosed, and the administrative law judge should have recused herself, or afford the Petitioner a hearing on recusal on the basis of the foregoing.

The Complaint was explicit that it did not seek judicial review of the Respondent's decision in the administrative hearing against the Petitioner. That was concluded. The Petitioner made the same argument to the New York State Supreme Court Appellate Division, that the Complaint subjudice concerned denial of due process because the administrative law judge, did not recuse herself nor afford a recusal hearing. The motion and appellate courts in New York were mistaken in dismissing the Complaint on the grounds that the Petitioner sought to relitigate his disciplinary hearing. The Complaint was concerned with the conduct of that administrative hearing, not with the issue considered at the administrative hearing. The due process issue based on the administrative law judge's suppression of her residence was not raised at the disciplinary hearing, because it was undisclosed.

The fact that the administrative law judge did not decide the ultimate issue at the hearing is not determinative, because, pursuant to Civil Practice Law and Rules, Article 78, the judicial review afforded to the Petitioner, of the disciplinary decision of the Respondent, was limited to whether the ultimate decision was supported by the evidence in the record. The administrative law judge controlled the latter.

The Petitioner can refer to several instances in the record of the administrative hearing in which the administrative law judge made ruling which the Petitioner was, and remains, convinced were affected by the bias of the administrative law judge in favor of the complaining witnesses, who resided in the same building for many years. However, in the absence

of hearing, on whether the complaining witness and the administrative law judge had any degree of interrelation with each other in the course of years, and if so, the extent of such relationship, on the basis of common residence, in the same apartment building, the Petitioner was without recourse.

It is axiomatic that due process requires not only an impartial judicial trial, but also, an impartial administrative trial. *Barszez v. Board of Trustees of Community College Dist No. 504, Cook County*, 400 F. Supp. 675, aff'd 539 F.2d 715, certiorari dismissed 420 U.S. 1080, 97 S. Ct. 827, 50L Ed 2d 801(1975). The Petitioner had a due process right to have the administrative law judge disclose that there could have been an acquaintance with the complaining witness, acquired from years of residence in the same building and furthermore lay bear any opinions the administrative law judge may have formed concerning the complaining witness on the basis of the foregoing. Of greater concern than prejudgment of issues of law or policy, is, ". . . a preconceived view of facts at issue in a specific case. . . *3 Davis, Administrative Law* §19.2, 19.4 [2d id, 1978]

Conclusion

The application of certiorari should be granted.

Dated: New York, New York
September 6, 2005

Respectfully,

MARVIN M. DAVID
BRYER & DAVID
Attorneys for Petitioner
P.O. Box 6095
New York, New York 10128
(212) 369-2530

APPENDIX

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the seventh day of June 2005

PRESENT, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

1-10 Mo. No. 319

Gerard V. Sunnen,

Appellant,

v.

The New York State Department of Health, Board of Professional Medical Conduct,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon laid, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

Tom, J.P., Andrias, Ellerin, Gonzalez, Catterson, JJ.

5408 Gerard V. Sunnen,

Plaintiff-Appellant,

-against-

The New York State Department of Health, Board of Professional Medical Conduct,

Defendant-Respondent.

Bryer & David, New York (Marvin M. David of counsel), for appellant.

Eliot Spitzer, Attorney General, New York (Marion R. Buchbinder of counsel), for respondent.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered January 2, 2004, which granted defendant's motion to dismiss the complaint, unanimously affirmed, with costs.

Plaintiff's license to practice psychiatry was revoked in 1996 for engaging in sexual relations with two of his patients, improperly prescribing medication for them, and consuming alcohol with one of them. Plaintiff brought an article 78 proceeding in the Appellate Division, Third Department, which has exclusive jurisdiction to review determinations of the Administrative Review Board for Professional Medical Conduct (Public Health Law § 230-c[5]; *Horne v New York State Dept. of Health*, 287 AD2d 940 [2001]). That court confirmed the administrative determination, rejecting plaintiff's challenge based on an unsubstantiated allegation of personal bias on the part of one member of the Board's Hearing Committee (*Matter of Sunnen v Administrative Review Bd. for Professional*

Med. Conduct, 244 AD2d 790 [1997], *lv denied* 92 NY2d 802 [1998]).

Five years later, plaintiff now seeks vacatur of the revocation and a de novo hearing on the ground that the administrative law judge who presided over his disciplinary hearing should have recused himself because he lived in the same apartment building as one of the complaining witnesses. In these circumstances, this action was properly dismissed for lack of subject matter jurisdiction.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUAKY 17, 2005

/s/ Catherine O'Hagan Wolfe
CLERK

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Kornreich, Shirley Werner, J. PART 54
Justice

0109127/2003

SUNNEN, GERARD V.
vs.
N.Y.S. DEPT. OF HEALTH

SEQ 1

DISMISS ACTION

INDEX NO. 109127/03

MOTION DATE _____

MOTION SEQ. NO. ____

MOTION CAL. NO. ____

NYS SUPREME COURT
RECEIVED
DEC 19 2003
I.A.S. MOTION
SUPPORT OFFICE

The following papers, numbered 1 to _____ were read on this motion to/for dismiss

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause - Affidavits — Exhibits _____	1, 2
Answering Affidavits — Exhibits _____	3
Replying Affidavits _____	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion to dismiss is granted. In its amended complaint, plaintiff seeks a vacatur of defendant's Administrative Review Board Determination and Order and a hearing de novo. Public Health Law § 230-c(5) provides that "an order of the administrative

review board for professional medical conduct . . . may be reviewed pursuant to the proceedings under article seventy-eight of the civil practice law and rules. Such proceeding shall be returnable before the appellate division of the third judicial department[.]"

Under PHL § 230-c(5), this Court does not have subject matter jurisdiction over the instant action. Accordingly, plaintiff's complaint is dismissed.

The foregoing constitutes the decision and order of this Court.

FILED
JAN -2 2004
COUNTY CLERK'S OFFICE
NEW YORK

SHIRLEY WERNER KORNREICH
J.S.C.

Dated: 12/15/03

/s/ Shirley Werner Kornreich
J.S.C.

Check One: ☒ FINAL DISPOSITION
☐ NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____